

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6063

To be argued by
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United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6063

ASSOCIATION OF NATIONAL ADVERTISERS, INC.,
Plaintiff-Appellant,
—against—

FEDERAL TRADE COMMISSION, CALVIN J. COLLIER, Chairman, PAUL RAND DIXON and ELIZABETH HANFORD DOLE, Commissioners,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF ON APPEAL

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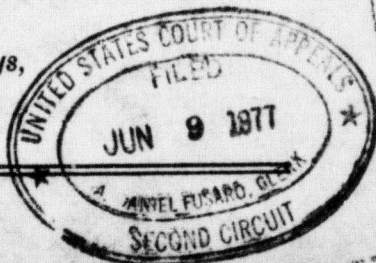




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man, PAUL RAND DIXON and ELIZABETH HANFORD
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APPELLEES' BRIEF ON APPEAL

Preliminary Statement

This is an appeal by the Association of National Advertisers (the "plaintiff") from an order of the United States District Court for the Southern District of New York, John M. Cannella, J., denying plaintiff's motion for a preliminary injunction to stay a rulemaking proceeding before the Federal Trade Commission (the "FTC"), and granting defendants' motion to dismiss the complaint.

Plaintiff, the representative of a number of national advertisers before the FTC in the rulemaking proceeding, more fully described below, brought this action to enjoin the FTC proceeding until the District Court determined whether to enter an order directing the FTC to expunge from the record of the rulemaking proceeding "all mat-

ters" entered therein by the FTC staff from April 18 to April 30, 1976. Moreover, plaintiff requested that the District Court direct that the rulemaking record be limited to matters demonstrated to be relevant to the issues designated for hearing pursuant to applicable FTC rules and regulations.

On February 14, 1977, in a memorandum decision, the District Court denied plaintiff's motion and granted defendants' motion to dismiss, holding that it lacked the requisite jurisdiction to review the FTC's refusal to excise the record because the refusal was not a "final agency action for which there is no adequate remedy in court". (Appendix 3a).^{*} On February 17, 1977 a judgment was entered dismissing the complaint. The rulemaking proceeding is still pending before the FTC.

The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

Issues Presented for Review

a) Whether the courts of appeals are the exclusive forum for review of the issues herein?

b) Whether plaintiff was required to exhaust its administrative remedies before prevailing upon the court for judicial review?

c) Whether the decision of the hearing officer denying plaintiff's request to excise portions of the record and to limit submissions constituted "final agency action" ripe for judicial review?

d) Whether the plaintiff's Constitutional rights were violated by the hearing officer's refusal to excise portions of the record?

^{*} References "—a" are to pages of the joint appendix submitted with appellant's brief.

Statement of Facts

In the Federal Register of November 11, 1974 the FTC published notice of its initiation of a proceeding for the promulgation of a Trade Regulation Rule concerning food advertising practices. (28a-48a). The Commission's notice invited public comment on the proposed rule as set out in the notice. Thereafter, on May 28, 1975 the Commission republished the proposed food advertising practices rule and invited further comment. (21a-26a). The Commission noted in its May 28, 1975 notice that its "objective in these proceedings is to develop rules which will assure the accuracy of nutrition claims without restricting the amount of useful information an advertiser may present" (22a).

On March 2, 1976 the Presiding Officer of the rule-making proceeding published in the Federal Register a "Final Notice Regarding Proposed Trade Regulation Rule", 41 Fed. Reg. 8980 et seq. (March 2, 1976), pursuant to 16 C.F.R. §§ 1.12 and 1.13(c) (1) (i). (7a). The Final Notice contained a provision whereby the Presiding Officer directed that the proceeding be separated into three phases, each phase to cover different sections of the proposed rule. From the commencement of the proceeding to issuance of the Final Notice a substantial volume of documents were introduced into the record of the proceeding, (8a), some related to sections of the proposed rule to be considered in the first phase of the proceeding and others related to sections to be considered in later phases. (108a-109a).

On or about March 5, 1976 plaintiff filed a "Notification of Interest" in the proceeding, pursuant to 16 C.F.R. § 1.13(d) (3), seeking certain procedural rights during the rulemaking as set forth in 16 C.F.R. § 1.13(d) (5) and (6). (55a-58a). Thereafter, the Presiding Officer notified plaintiff that it would be designated as a group representative in the proceeding pursuant to 16 C.F.R. § 1.13(c) (1) (v). (7a).

On or about April 12, 1976 plaintiff filed a petition with the Presiding Officer to segregate those portions of the record deemed to be relevant to the first phase of the proceeding from the remainder of the record, which plaintiff alleged was not relevant. (69a-71a). The petition was denied on April 22, 1976. (69a-71a).

From April 28, 1976 to April 30, 1976 staff of the FTC inserted a substantial number of documents into the public record of the proceeding. Plaintiff alleges that the bulk of these documents are not relevant to the first phase of the proceeding. Moreover, plaintiff alleges that in some instances the documents are not relevant to any portion of the proceeding. (9a).

On or about June 11, 1976 plaintiff filed a petition with the Presiding Officer requesting a six-month postponement of the commencement of the first hearing with respect to phase one of the proceeding from the scheduled date of July 12, 1976 (9a). The request was denied on June 16, 1976. (9a).

Copies of the documents which were introduced into the record between April 28, 1976 and April 30, 1976 were made available to plaintiff on June 16, 1976. (9a).

On June 28, 1976 plaintiff filed a further petition with the Presiding Officer requesting the same relief which it requested in the Court below. (92a-101a). In addition, plaintiff requested that an adverse ruling be certified for immediate review by the full Commission and that further hearings be postponed until final determination by the Commission. (101a). By letter dated July 1, 1976 this petition was also denied. (108a-109a).

Plaintiff alleges that to require it to review approximately 25,000 pages of documents which are part of the

record will subject it to an undue hardship. (116a). Plaintiff also alleges that the existence of so substantial an amount of material in the rulemaking record will adversely affect its right to rebuttal and cross examination. (116a ¶ 20). Finally, plaintiff contends that the adverse effects of the rulings by the Presiding Officer with respect to the content of the record abridge its First and Fifth Amendment rights. (Appellant's brief p. 39). Consequently, it is plaintiff's contention that inability to review the Commission decision prior to the end of the proceeding will result in irreparable harm (Appellant's brief p. 17).

Principal Statutes and Rules Involved

Section 18 of the Federal Trade Commission Act as amended by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637, 88 Stat. 2183,* codified in 15 U.S.C. § 57a, establishes the Commission's authority to issue substantive rules concerning unfair or deceptive acts or practices in or affecting commerce and provides the procedural requirements for the issuance of such rules. (15a-19a). To promulgate a binding rule the Commission must:

- (1) publish notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record . . . , together with a statement of basis and purpose. (15 U.S.C. § 57a(b)).

In the informal hearing the following procedure is to be used:

* Hereinafter referred to as "Magnuson-Moss Act" or the "Act".

(1) Subject to paragraph (2) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submission (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (2) (B)) such cross-examination of persons *as the Commission determines* (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(2) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay.

* * *

(3) (A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (1) and (2) would be entitled to conduct (or have conducted) cross-examination and *who are determined by the Commission to have the same or similar interests* in the proceeding . . . the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination should be limited. (15 U.S.C. § 57a(c)) (emphasis added).

Subsection (e) of 15 U.S.C. § 57a provides that any interested person may seek judicial review in a court of appeals of any rule promulgated upon the rulemaking record which is defined as: "the rule, its statement of basis and purpose, the transcript required by subsection (e) (4) of this section [of the informal hearing], any ~~written~~ submissions, and any other information which

the Commission considers relevant to such rule." (15 U.S.C. § 57a(e)(1)(B)). It further provides that "if the petitioner . . . applies to the court [of appeals] for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court [of appeals] that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court [of appeals] may order the Commission to provide additional opportunity to make such submissions and presentations." (15 U.S.C. § 57a(e)(2)). Subsection (e)(3)(B) also requires that the court of appeals shall hold unlawful and set aside the rule if, *inter alia*,

the court finds that—

- (i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or,
- (ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

Finally, the statute provides:

A determination, rule, ruling of the Commission described in paragraph (3)(B)(i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). (15 U.S.C. § 57a(e)(5)(C)).

Pursuant to this statutory authority the Commission has issued rules governing rulemaking proceedings that appear in its Rules of Practice and Procedure. (16 C.F.R.

§ 1.11 et seq.). These rules provide for the appointment of a Presiding Officer to conduct the rulemaking proceeding, 16 C.F.R. § 1.13(c), and delegate to him the power, *inter alia*, to:

make rules and rulings limiting the representation of interested persons for the purposes of examination, including cross-examination, and governing the manner in which such examination is to be limited, including the selection of a representative from among a group of persons with the same or similar interests. (16 C.F.R. § 1.13(c) (1) (v)).

These rules also provide that:

The Presiding Officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submission relevant to the issues designated for consideration. . . .

* * *

After consideration of the information supplied in response to the final notice, the presiding officer shall identify groups of persons with the same or similar interests in the proceedings. Such groups may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the presiding officer may select a representative of each such group. (16 C.F.R. § 1.13(d) (5) (D) (ii)) (emphasis added).

After the close of the informal hearing the Presiding Officer is required to prepare a summary of the record, "both written and oral" and make initial factual findings and conclusions which, along with staff recommendation and public comment thereon, are transmitted to the Commission. (16 C.F.R. § 1.13(f-h)). Based on the entire

record the Commission may issue, modify, or decline to issue a rule. (16 C.F.R. § 1.14(a)). Moreover, the Commission may withhold final action on the rule pending the receipt of additional information or additional views of interested persons if it deems it necessary. (*Id.*).

ARGUMENT

POINT I

The District Court Properly Found That It Did Not Have Jurisdiction Over The Subject Matter Of The Complaint.

A Magnuson-Moss Act rulemaking proceeding is not subject to judicial review, except in a United States Circuit Court of Appeals. (15 U.S.C. § 57a(e)(1)(A)). Moreover, except in extraordinary circumstances, intermediate administrative rulings are not judicially reviewable until the administrative proceedings are completed.

a) Courts of Appeals Have Exclusive Jurisdiction To Review FTC Rulemaking Proceedings

Plaintiff sought to have the District Court exercise jurisdiction to direct the FTC to excise certain portions of the record and to limit the record to "matters" shown to be relevant to the specific issues under consideration. Provision for judicial review under the Magnuson-Moss Act is embodied in 15 U.S.C. § 57a(e)(1)(A):

Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person (includ-

ing a consumer or consumer organization) may file a petition in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule . . . *

The Act specifically provides that the United States Court of Appeals shall have "exclusive" jurisdiction over such actions.

The United States Courts of Appeal shall have *exclusive jurisdiction* of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a) (1) (B) of this section, *if any district court of the United States would have had jurisdiction of such action but for this subparagraph*. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph. (15 U.S.C. § 57a(e) (5) (B) (emphasis added)).

The foregoing provisions establish the sole procedure for invoking jurisdiction for judicial review under the Act. While the provisions are clear on their face as to when such review is appropriate, the Act's legislative history as embodied in Senate Report No. 93-1048 makes it abundantly clear that Congress intended the courts

* Although plaintiff attempts to create the impression that the Court of Appeals merely reviews the final rule (Appellant's Brief, p. 22), the Act explicitly provides that the entire rule-making record is to be transmitted to and reviewed by the appropriate Court of Appeals once a petition challenging some aspect of the rule has been filed. 15 U.S.C. § 57a(e) (1) (B).

of appeals to be the exclusive forum for all pre-enforcement judicial review:

The conference report provides for judicial review of final rules in appropriate U.S. Circuit Courts of Appeals. *The venue for pre-enforcement review* (whether under this subsection or under chapter 7 of Title 5 of the United States Code) *is exclusively vested in such courts.* If a petitioner desires such review in accordance with the review standards set forth in section 18(e)(3)(c), he must file a petition not later than sixty days after the rule is promulgated. (1974 U.S. Code Cong. & Administrative News, pp. 7755-7767, at 7766 (emphasis added)).

Therefore, the district court was not a proper forum for plaintiff's action.

b) The Administrative Procedure Act Does Not Authorize Interlocutory Judicial Review

Plaintiff's contention that judicial intervention is authorized under 5 U.S.C. § 704 is misplaced. This argument is in conflict with the statutory language and the authority interpreting the provision. Section 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review. A preliminary, procedural, intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

It is clear that review under this provision is predicated upon (1) final agency action, *i.e.*, not preliminary,

procedural or intermediate; and (2) the absence of other adequate judicial remedies. In the present case the rulings complained of by plaintiff are purely procedural in nature, reviewable at the conclusion of the proceedings. *Seven-Up Company v. F.T.C.*, 478 F.2d 755, 757 (8th Cir. 1973); *Holland Furnace Company v. Purcell*, 125 F. Supp. 74, 82-85 (W.D. Mich. 1954). Even if, for the sake of argument, these rulings were not procedural in character the Act specifically provides a perfectly adequate method of review of claims such as plaintiff asserts as discussed in c) below.

c) Courts of Appeals Have Exclusive Jurisdiction To Review Rulings on Cross-Examination And Rebuttal in FTC Rulemaking Proceedings

Plaintiff's sole argument is that the size of the record before the Commission, in effect, limits its ability to cross-examine and submit rebuttal evidence. The argument suffers from a single fatal flaw that is, the Act embodies an explicit procedure to remedy injuries resulting from a ruling limiting cross-examination or rebuttal submissions. (15 U.S.C. § 57a(e)(3)).

Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if—

* * *

(B) the court finds that—

- (i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or
- (ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole. . . . (§ 57a(e)(3)(B)).

* * * * *

- (C) A determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). . . . (§ 57a(e)(5)(C)).

The legislative history with respect to these provisions for review of rulings connected with an individual's right to cross-examination and/or rebuttal submissions firmly establishes their exclusivity:

The conference report provides for judicial review of final rules in appropriate U.S. Circuit Courts of Appeals.

* * * * *

Such a rule would also be set aside if the court found that any Commission action in excluding or limiting cross-examination or rebuttal submissions precluded disclosure of disputed material fact necessary for fair determination of the rulemaking proceeding taken as a whole.

Section 18(c)(5)(c) provides that the only "substantial evidence rule" review of a section 18(a)(1)(B) rule which is available to a person challenging a rule is under section 18(e)(3)(A). *Likewise, the only review of a Commission determination, rule, or ruling under section 18(c) limiting cross examination or rebuttal submissions would be under section 18(c)(3)(B).* Thus, neither substantial evidence review nor review of limitations on cross examination and rebuttal submissions could be obtained in enforcement proceedings, or in a preenforcement judicial review action brought after the 60-day period specified in section 18(e)(1). *In addition, section 706(2)(e) of title 5 United States Code, would not be applicable in any judicial review of such a rule, and section 706(2)(D) of such title would not be the basis of reviewing limitations on cross examination and rebuttal submissions.*

The judicial review provisions in the bill specifically authorize the court to receive application from a petitioner or the Commission for permission to make additional oral or written presentations if there were reasonable grounds for failure to make such presentations in the proceedings before the Commission. Thus, a person who is contending in a review proceeding that any inability to engage in cross-examination or submit rebuttal information has resulted in unfairness may be able to cure any alleged unfairness by applying to the court to make additional presentations.

The judicial review provided for in section 18 is not exclusive. Such review, for example, could also be obtained under the provisions of chapter 7 of title 5 of the United States Code, subject to the limitations described above. *For such review,*

the United States Courts of Appeals would be the exclusive forums of such review, except when it occurs in the course of an enforcement proceeding. (S. Rept. No. 93-1408, 83d Cong., 2d Sess. 34-55 (1974) reprinted at 1974 U.S. Code Cong. & Admin. News p. 7755, 7766-7767 (Emphasis supplied)).

Thus, both the statute and legislative history plainly establish that the exclusive review of a ruling with respect to cross-examination and/or rebuttal is in the Court of Appeals at the end of the rulemaking proceedings.* Notwithstanding the clear adverse implications of the statute with respect to the instant challenge, plaintiff does not address the issue with a full fledged argument. Instead, plaintiff relegates the problem to a footnote.

¹⁰ Section 57a(e)(5)(C), which does deal explicitly with cross-examination and rebuttal, imposes appellate exclusivity only where the allegedly improper curtailment arises out of a "determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii)". Those paragraphs refer, in turn only to Commission actions pursuant to "a Commission determination, . . . or rule or ruling *under subsection (c) of this section*", either that "the petitioner is not entitled to conduct cross-examination or make rebuttal submissions" or "limiting the petitioner's cross-examination or rebuttal submissions" (emphasis ours).

* The Court must also bear in mind the fundamental axiom that statutory provisions for an exclusive mode of review carry with them a concomitant proscription on alternative modes of review, *even in circumstances where such review might otherwise be appropriate.* *United States v. Babcock*, 250 U.S. 328 (1919); see also *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 422 (1965); *McCauley v. Waterman S.S. Corp.*, 327 U.S. 540, 543-545 (1946).

Indeed, appellate jurisdiction over the matter involved in this case is not even conferred upon courts of appeals by section 57a(e) which speaks only to reviewing the final rule itself, together with the subsection (c) actions above-described. Only 5 U.S.C. § 704—which, as we shall point out below, is not an exclusionary mandate—would vest a court with reviewing authority over such issues as are raised herein. [Appellant's brief, pp. 22-23].

It is difficult to understand how this footnote serves to distinguish the facts of this case from the obvious factual circumstances that Congress intended to be covered by § 57a(e)(B)(3) and (e)(5)(c). First, it is undisputed that the Presiding Officer acted on behalf of the Commission in denying plaintiff's application to excise portions of the record and to limit material accepted into the record. Second, it is also undisputed that plaintiff claims that such ruling, in effect, limits its rights to conduct a meaningful cross-examination and rebuttal. Hence, the circumstances of the case at bar, according to plaintiff's contentions, clearly fall within the framework of the Act's proviso covering review of rulings on cross-examination and rebuttal, insofar as the Presiding Officer's ruling is a "Commission . . . ruling under subsection (c) of this section . . . limiting the petitioner's cross-examination or rebuttal submissions."

Moreover, plaintiff cannot circumvent the clear statutory designation of the Court of Appeals as the appropriate forum for pre-enforcement review by a mere allegation that the incomplete nature of the proceedings prevents it from obtaining an adequate remedy. (Appellant's brief p. 39). See, *Bradley Lumber Co. v. N.L.R.B.*, 84 F.2d 97 (5th Cir. 1936). Plaintiff also suggests that the ordinary method of review will not be adequate to protect

its interest; however, "[i]t is well settled that the right of review afforded by the Circuit Court of Appeals constitutes a 'plain, speedy and adequate remedy and is a bar to the remedy by injunction'. *F.T.C. v. Claire Furnace, Co.*, 274 U.S. 160 (1927).*

Thus where Congress has provided adequate procedures for judicial review of administrative action, those procedures should be followed and only in extraordinary circumstances, which plaintiff has not shown, will deviation be justified. *Borden v. F.T.C.*, 495 F.2d 785 (7th Cir. 1974); *Frito-Lay, Inc. v. F.T.C.*, 380 F.2d 8 (5th Cir. 1967).

d) Courts Should Not Review Intermediate Administrative Rulings

The most important considerations in determining whether a statute contains adequate provision for review is that the procedures before the agency are appropriate and that the review afforded by the courts of appeals is sufficient to protect against possible illegal action on the part of the agency. Such protections are embodied in the Act and plaintiff cannot argue that it will suffer irreparable injury if the proceeding continues. Plaintiff merely wants this Court to substitute its judgment for that of the Presiding Officer in the "housekeeping" aspects of the proceeding. Courts have traditionally frowned upon such requests. The proceeding should not be interrupted by a challenge of this kind.

* Although *F.T.C. v. Claire Furnace, Co.*, *supra* was an adjudicative proceeding, the purpose of the proceeding is not dispositive. Rulemaking proceedings are governed by the same considerations with respect to a statutory provision for exclusive review as are adjudicative proceedings. See *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967).

The proceeding should be completed and if plaintiff continues to believe that his rights to cross-examination or rebuttal have in some way been abridged by the Commission's procedures it will have a right to raise this objection in a court of appeals. Surely, that was Congress' intent and it is respectfully submitted that this Court should abide by that intent. The Supreme Court expressed similar views in the analogous case of *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947) :

The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitution reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. (*Id.* at 767).

These principles are especially important with respect to a challenge of the kind being made by plaintiff. For

the District Court to substitute its judgment for that of the Commission on a purely procedural matter is not only perilous on its face but inconsistent with the fundamental immunity from interference in purely procedural administrative matters which the judiciary recognizes. In *Coca Cola Company v. F.T.C.*, 475 F.2d 299, 304-305 (5th Cir. 1973), the Court stated:

The plaintiffs are asking that a procedural, 'case handling decision be overturned in media res to require joinder 'with the concomitant complication and clutter of the hearing.' L. Jaffe, *Judicial Control of Administrative Action* 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. § 1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been, immune from interlocutory review of procedural rulings. E.g., *Texaco, Inc. v. F.P.C.*, 117 U.S. App. D.C. 268, 329 F.2d 223 (1963), *cert. denied*, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed. 2d 272 (1964); *Chicago Automobile Trade Association v. Madden*, 328 F.2d 766, 769 (7th Cir.), *cert. denied*, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed. 2d 747 (1964). If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events have taken that course. See *Riss & Co. v. United States*, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345 (1951). For the time being, plaintiffs 'must, as all others similarly situated must, wait with such fortitude and patience as . . . [they] can muster'. *Volney Felt Mills, Inc. v. Le Bus*, 196 F.2d 497, 498 (5th Cir. 1952).

In substance plaintiff's demands for relief are aimed at modifying the Commission's procedural decision. There is no material difference between the relief requested in the present case and the relief requested in

Coca Cola, supra. Hence, the result in this case should be no different than the results in *Coca Cola, supra.*

POINT II

In The Absence of a Clear Showing of Irreparable Harm, The Courts Lack Jurisdiction to Intervene in an On-Going Administrative Proceeding.

Apart from the fact that the Courts of Appeals alone are vested with exclusive jurisdiction to review an FTC rulemaking proceeding, it is well settled that a federal district court will not intervene in a pending administrative proceeding, except in extraordinary circumstances. *Renegotiation Board v. Bannerkraft*, 415 U.S. 1 (1974); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Seven-Up Co. v. F.T.C.*, 478 F.2d 755 (8th Cir. 1973). *Sears, Roebuck & Co. v. N.L.R.B.*, 473 F.2d 91 (D.C. Cir. 1973); *Coca-Cola Company v. F.T.C.*, 475 F.2d 299 (5th Cir. 1973); *Bristol-Myers Company v. F.T.C.*, 469 F.2d 1116 (2d Cir. 1972). This principal is applicable to all Federal Trade Commission proceedings. *Borden, Inc. v. F.T.C.*, *supra*; *Maremont Corp. v. F.T.C.*, 431 F.2d 124, 127-128 (7th Cir. 1970); *American Insurance Co. v. F.T.C.*, 496 F.2d 197, 200-201 (5th Cir. 1974).

An indispensable condition precedent to judicial intervention in a pending agency proceeding is a clear showing of irreparable harm. *Renegotiation Board v. Bannerkraft, supra*; *Sears, Roebuck & Co. v. N.L.R.B., supra*; *Bristol-Myers Company v. F.T.C., supra*. As the Supreme Court stated in *Bannerkraft, supra*.

Without a clear showing of irreparable harm, see *Virginia Petroleum Jobbers Ass'n. v. F.P.C.*, 104 U.S. App. D.C. 106, 111, 259 F.2d 921, 926 (1958),

failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. (415 U.S. at 3).

Plaintiffs have not shown injury sufficient to justify judicial intervention in an ongoing agency proceeding. In the few enumerated instances where courts have found it necessary to intervene in an ongoing administrative proceeding the injuries which were threatened were substantial enough to invite restraint. These included, an agency acting in excess of delegated powers or contrary to specific statutory mandate, *Leedom v. Kyne*, 358 U.S. 184 (1958); proceedings involving questions of high national interest because of their international complexion, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); and an agency's violation of a party's constitutional rights, *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949).

In this case, plaintiff's principal objection to the proceeding involves submission of documents. Essentially, plaintiff challenges the Commission's practice of permitting the public to include an unlimited quantity of documents in the record. Plaintiff finds this practice particularly annoying because some of these documents in plaintiff's opinion do not appear to have any relationship to the issues involved in the first phase of the proceeding.*

* In this connection the Presiding Officer's July 1, 1976 letter makes it clear that the proceeding was separated into phases in order to facilitate orderly management for the benefit of the participants as well as the FTC. (108a-109a). More important, the letter also points out that the plaintiff's position that the record should be limited to documents relevant to specific phases ignores the fact that the rulemaking proceeding, while bifurcated, pertains to a single rule. Thus, submissions which are relevant to the rule, regardless of when submitted, are entered at that time.

The Act provides for unlimited submission of documents:

When prescribing a rule under subsection (a) (1) (B) of this section, the Commission shall . . . allow interested persons to submit written data, views, and arguments and make all submissions publicly available. (15 U.S.C. § 57a (b) (2)).

The Commission is required to "allow submission of written data, views and arguments". The statute does not limit the volume or content of the material which is to be accepted.

Plaintiff attempted to persuade the District Court that the equities in this case weigh in favor of judicial intervention. This argument has no place in an appeal for judicial intervention in an administrative proceeding. In *Coca-Cola v. F.T.C.*, *supra* at 304, the Court stated:

The extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to 'correct' an interlocutory agency ruling is available wherever an agency ruling differed from equitable maxim.

The thrust of plaintiff's arguments on the merits of its claims are aimed at lessening the financial burden

inherent in preparing for a proceeding in which a substantial record has been developed. (117a-119a). Plaintiff's claim that to participate in the proceeding will require more time, work and expense than would otherwise be required if the Court limited submissions, does not represent an adequate basis for judicial intervention in the proceeding.* The potential financial burdens of participation in an administrative proceeding is no basis for judicial intervention. It is firmly established that the mere expense and inconvenience of a prospective administrative hearing does not, without more, constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 41-52 (1938); *Niagra Mohawk Power Corp. v. F.P.C.*, 538 F.2d 966 (2d Cir. 1976). Plaintiff admits that a substantial portion of the record has no relevance to the first phase of the proceeding. Consequently, a substantial portion of the record need not be thoroughly reviewed. If the amount of irrelevant material is nearly as great as plaintiff suggests, the task of review and preparation for hearing should be reduced substantially. Moreover, if a substantial portion of the subject material relates to other phases of the proceeding plaintiff need only segregate this material for use when occasion arises. Concededly, this alternative to judicial intervention may require expense and manpower; however, essentially plaintiff is suggesting that the Commission perform a similar function prior to plaintiff's review of the record.

Plaintiff relies heavily upon *Leedom v. Kyne*, *supra*, to support its proposition that immediate judicial intervention is justified in the present case. This re-

* Plaintiff does not claim in its appeal that it can not perform the necessary review, it merely claims that it should not have to. Thus, plaintiff's claimed injury, if any, is inconvenience of the task.

liance is misplaced. In *Leedom*, the Court was sustaining intervention in a case in which the National Labor Relations Board had formulated a ruling which was specifically prohibited by the Section 9(b)(1) of the National Labor Relations Act. This case clearly does not involve an agency ruling prohibited by statutory mandate.

Plaintiff also cites *Jewel Companies, Inc. v. F.T.C.*, 432 F.2d 1155 (7th Cir. 1970); *Elmo Division of Drive X Co. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965). These cases are not relevant to the present case. In each of these cases adjudicatory proceedings had been commenced against plaintiff. Moreover, each of these cases involved circumstances in which the plaintiff had no opportunity to obtain effective judicial review at the conclusion of the administrative proceedings. See *Lever Bros. Company v. F.T.C.*, 325 F. Supp. 371, 373-374 (S.D. Mo. 1971).

The remaining cases cited by plaintiff support the proposition that the judiciary has jurisdiction to intervene in an administrative proceeding where the agency's acts were contrary to a specific statutory mandate. Unfortunately, plaintiff has failed to establish that the Hearing Officer, in the present case, acted contrary to statutory mandate. More important, the prior discussion in this brief firmly supports the opposite conclusion. Hence, the myriad of cases cited by plaintiff with respect to ultra vires agency action are inapposite to the facts before this Court.

POINT III

Exhaustion Is a Sine Qua Non to Review of Procedural Rulings.

a) The Presiding Officer's Ruling Was Not A Final Agency Action

Plaintiff's often labored argument does not alter the requirement of exhaustion. The Act provides that where a ruling has limited cross-examination, and where it is shown that such a ruling has precluded disclosure of disputed material facts necessary for fair determination in the rulemaking proceeding taken as a whole, then the rule which results from the proceeding must be set aside and a new proceeding commenced. This determination is not made, however, until completion of the proceeding. Plaintiff argues that the prescribed mode of review is not adequate because it contemplates completion of the proceeding. Furthermore, plaintiff contends that the ruling is final because its request for Commission review was denied and the potential harm it will suffer is immediate. This proposition is refuted by the cases cited in plaintiff's brief.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), is the leading Supreme Court case with respect to judicial intervention in an ongoing administrative proceeding. The decision in *Abbott* is predicated upon a final agency determination immediately affecting substantial Constitutional rights of the petitioning party. The case involved the Secretary of Health, Education and Welfare's issuance of regulations requiring certain labeling on drugs. The regulations were final insofar as drug manufacturers were required to comply with them immediately upon threat of criminal penalty. The present case does not involve an administrative determination even remotely

comparable to the kind of determination under attack in the *Abbott* case. Before the proposed rule in the present case can be enforced, the proceeding is open to ample judicial review. Plaintiff's reference is, therefore, clearly inappropriate. While *Abbott* is clearly inapposite, its discussion of "finality" is helpful in placing plaintiff's argument in context. In *Abbott*, the Court specifically noted that "judicial intervention should only be considered where there is final agency action for which there is no other adequate remedy in Court." (387 U.S. at 140). The Court defined final action, as an action in which the agency promulgates a rule defined as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." (387 U.S. at 149). In concluding that the action of the agency in that case was final the Court relied heavily upon the impact that the agency ruling would have on the injured party's day to day business affairs: *

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." As the district court found on the basis of uncontested

* It is interesting to note that *Gardner v. Toilet Goods Ass'n., Inc.*, 387 U.S. 167 (1967) also cited by plaintiff (Appellant's brief, pp. 34-35) and decided during the same Supreme Court term as *Abbott*, involved a similar analysis by the Court, but the Court found that the immediate impact of the agency ruling was not as predictable and, therefore, would not support judicial intervention.

allegations, "either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." 228 F. Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stock of printed matter; and they must invest heavily in new printing type and new supplies. (*Id.* at 149).

Plaintiff attempts to fit the facts of this case into that analysis:

Indeed, ANA's dilemma is remarkably analogous to that in which Abbott Laboratories found itself insofar as inadequacy of deferred judicial review is concerned, *supra*, pages 17-20. If it goes ahead and does what the Commission says it must (in *Abbott* it was the Food and Drug Administration), it moots its own case and destroys any possibility of benefiting from the remedy which it should enjoy. If it proceeds under the assumption that its position is correct, only to have a court of appeals ultimately disagree with it, it runs the grave risk of having a final rule promulgated which contains provisions that may not have been supportable (or included) had ANA searched them out and subjected them to rebuttal. Damned if it does; damned if it doesn't! Only immediate review can obviate the potentiality of ANA's being irreparably hurt one way or the other. (Appellant's brief, p. 21).

To cite the proposition should be sufficeint to demonstrate its inappropriatness. Clearly the Court in *Abbott* was concerned about the *direct* impact of an agency ruling upon the day to day *business* affairs of the complaining party. Plaintiff's argument, in contrast, is addressed to the day to day conduct of litigation before an administrative body.

The *Abbott* case and its progeny were not intended to be employed where agency action was not final. Moreover, these cases have no application in circumstances where a statute specifically provides for review of the particular challenged agency action. Hence, this Court should not interfere in an ongoing proceeding to decide procedural propriety, where such function has been entrusted to the agency. In *McKart v. United States*, 395 U.S. 185, 193-194 (1969), the Court stated:

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise And of

course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise. [footnotes omitted.]

As stated earlier, the exhaustion doctrine has been departed from in certain unusual cases where the agency action on its face has exceeded some important constitutional or statutory right and has resulted in irreparable injury. However, plaintiff's claims that the rulings of the Presiding Officer will result in an expansive factual record, do not rise to this level. To the contrary, they are on the level of rulings which the Supreme Court has said are governed by the exhaustion doctrine, since they involve discretionary determinations. Of equal importance is the fact that, if error is committed, plaintiff will have an adequate remedy in the courts of appeals. The expense that plaintiffs may be subjected to in participating in a rule-making proceeding that may later, on judicial review, be

determined defective, does not constitute irreparable injury. *Renegotiation Board v. Bannerkraft Co.*, 415 U.S. 1, 24 (1974).*

POINT IV

Plaintiff Has No Absolute Right To Cross-Examination.

While plaintiff cites *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949) for the proposition that an "assertion of a constitutional right . . . not transparently frivolous", invites judicial intervention in an ongoing administrative proceeding, plaintiff fails to cite a single scrape of authority to support its proposition that the subject rulings deprive it of a constitutional right. Plaintiff's argument that the Presiding Officer's decision is an abridgment of its first amendment rights to free speech is confusing at best and clearly misplaced. (Appellant's brief, p. 29).

Plaintiff's argument is inappropriate for several reasons. First the legislative history of the Act evidences that Congress intended the Commission to have broad latitude in its regulation of cross-examination. Senator Moss' testimony with respect to Senate fears that procedural requirements in the bill would "hamstring" the

* In the extraordinary cases cited by plaintiff where courts have intervened in agency proceedings (e.g., *Leedon v. Kyne*, 358 U.S. 184 (1958); *Elmo Division of Drive-X Co. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965)) the reason for doing so has been that there was no adequate remedy to right the wrong complained of by the challenging party. Plaintiff complains, however, only that the remedy is too far in the future. Such a complaint should be lodged with Congress, which vested exclusive preenforcement review in the courts of appeals, not with the district court.

commission as was true of other agencies under the Administrative Procedure Act clearly demonstrates Congress' intent with respect to the right to cross-examination.

While there is a requirement that the Commission hold hearings at which interested persons may comment orally, the Commission has expressly been given the authority and discretion to prescribe rules to avoid unnecessary costs or delays in those hearings. (120 Cong. Rec. S. 21976 (daily ed., Dec. 18, 1974)).

Senator Moss proceeded to explain the limitations provided in the statute on the right to cross-examination, noting that such procedures had been approved for use in administrative proceedings by the Court of Appeals for the District of Columbia in *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), and concluded by stating:

These procedures will assure that rulemaking conducted by the Commission will be a far cry from the formal trial type procedures under sections 554 and 556 of the Administrative Procedure Act which have hamstrung other agencies, . . . The procedures should permit a fair airing of the views of all interested parties without unduly inhibiting the Commission's rulemaking authority. (120 Cong. Rec. S. 21976 (daily ed., Dec. 18, 1974)).

Congressman Broyhill also stated that these rights were not absolute. 120 Cong. Rec. H. 12348 (daily ed., Dec. 19, 1974). Under these circumstances it is abundantly clear that the absolute rights that plaintiff claims were never intended by Congress. Nor are such rights in an administrative proceeding recognized by the federal courts as absolute.

International Harvester v. Ruckelshaus, *supra*, was a case in which the Environmental Protection Agency made rules fixing automobile emission standards. Congress set a statutory standard but authorized the EPA to suspend it for one year on making specified findings. The EPA denied suspension, after a public hearing required by the statute. In addressing itself to an issue with respect to the absence of a general right of cross-examination, the Court stated:

we do not think the absence of a general right of cross-examination on the part of the companies was a departure from 'basic considerations of fairness.' . . . The auto companies were allowed to submit written questions to the Hearing Panel to be asked to various witnesses . . . We do not think more was required. . . . We distinguish between the assertion of a broad right of cross-examination of live witnesses on a subject of critical importance which could not be adequately ventilated under the general procedures. (478 F.2d at 630-631).

This view finds ample support in the case law from this circuit as well as many others. Indeed, the prevailing view is that cross-examination need not be provided for by statute, or agency rules in connection with a rule-making proceeding. See *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1973); *Long Island Ry. Co. v. United States*, 318 F. Supp. 490 (E.D. N.Y. 1970). In *Mobile Oil Co. v. F.P.C.*, 483 F.2d 1238 (D.C. Cir. 1973), the Court set forth the requirements for a natural gas ratemaking proceeding:

There must, however, be some mechanism whereby adverse parties can test, criticize and illuminate the plans in the evidentiary basis being advanced regarding a particular point. The traditional

method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses. (*Id.* at 1263).

The Act limits cross-examination to "disputed issues of material fact" which the Commission may determine it is necessary to resolve. Moreover, the Act does not confer on any party an absolute right to conduct cross-examination. The Commission determines whether cross-examination is appropriate and the Commission may, if it so chooses, conduct it. Consequently, plaintiff's entire argument is based upon the patently incorrect construct that it has an absolute right to cross-examination.

CONCLUSION

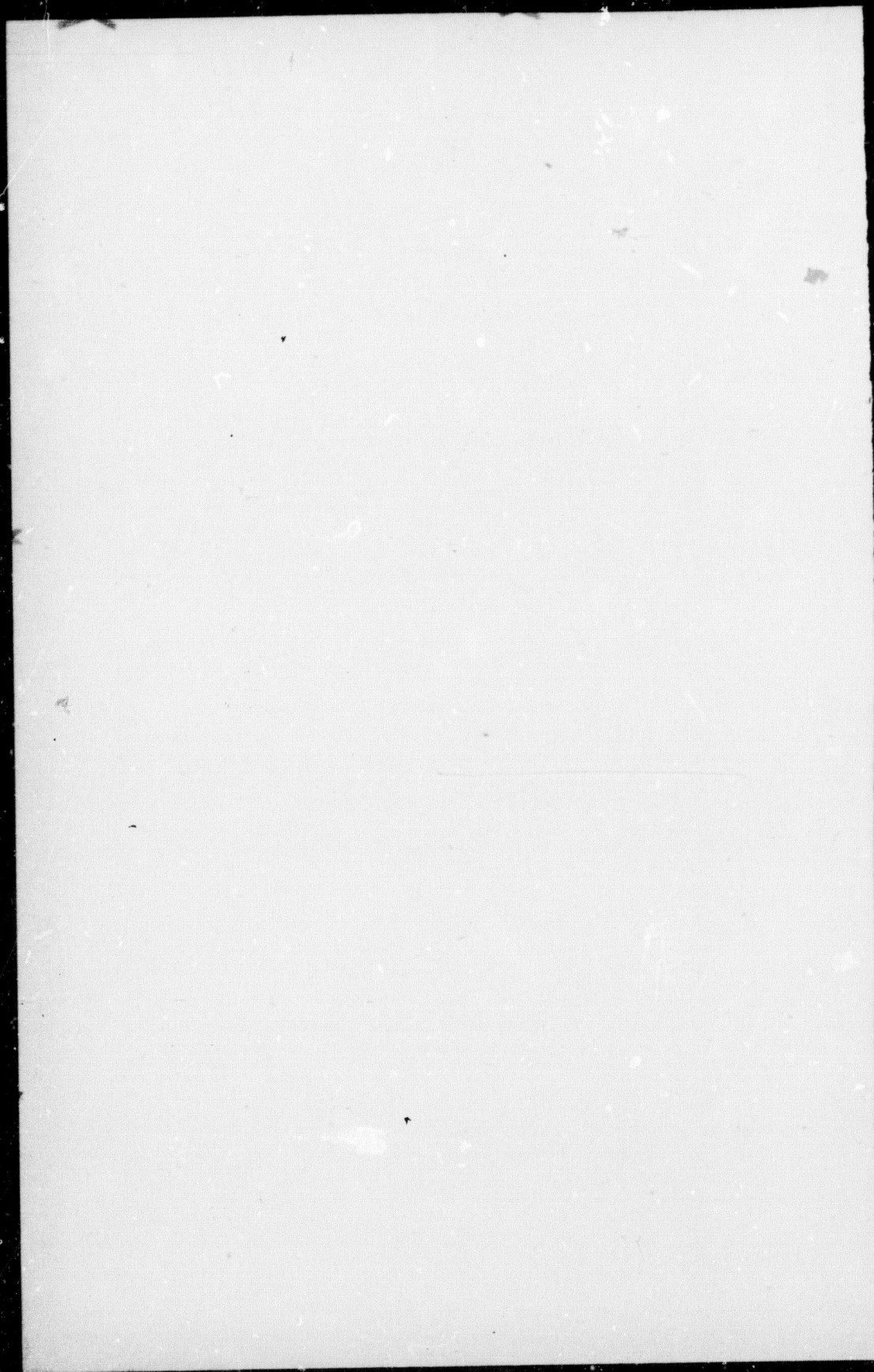
The February 14, 1977, decision of the District Court granting defendants' motion to dismiss and denying plaintiff's motion for a preliminary injunction should in all respects be affirmed.

Dated: New York, New York
June 6, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) as

Michael H. Dolinger being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

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Weil, Guttman & Davis
60 East 42nd Street
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Sworn to before me this

9th day of June, 19 77

PATRICK H. BARTH
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Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

Patrick H. Barth

